



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 53 of 2007

REPUBLIC.....PROSECUTOR

*VERSUS*

MONICAH WAMBUI NGIGE.....ACCUSED

RULING

Monicah Wambui Ngige was arraigned in court on 17<sup>th</sup> December, 2007 on an information dated 17<sup>th</sup> November, 2007 and filed in court on the 21<sup>st</sup> November, 2007 charging her with Murder contrary to *Section 203* as read together with *Section 204* of the Penal Code. She pleaded not guilty to the charge and her case was scheduled for 19<sup>th</sup> May, 2008 for hearing. On that date, the case could not take off as the state counsel was absent. It was then stood over to 30<sup>th</sup> June, 2008. On this occasion the accused through **Mr. Kariuki**, learned counsel gave notice of her intention to raise a constitutional issue with regard to her trial so far. However since the investigating officer was not present in court, **Mr. Orinda** learned Principal State Counsel successfully applied for adjournment.

The matter finally came before me for hearing of the preliminary point on 25<sup>th</sup> September, 2008. **Mr. Kariuki**, anchored the preliminary objection on the following lines. That the accused was arrested on the 9<sup>th</sup> September, 2007. However, it was not until 10<sup>th</sup> December, 2007, slightly over three months later that she was arraigned in court. The accused having been arraigned in court in excess of the fourteen days permitted by the law, it was the contention of the learned counsel that her constitutional rights as enshrined in *Section 72 (3)* thereof were violated as the delay had not been explained. The burden of such explanation lies squarely on the shoulders of the prosecution and the prosecution had so far not discharged the said burden. In support of this submission counsel relied on the case of **Albanus Mwasia Mutua V Republic, C.A. Criminal Appeal Number 120 of 2004.**

In response, **Mr. Orinda**, learned Principal State Counsel paraded **Sergeant Levis Chani** in the witness box in a bid to explain the delay, if any. **Sgt. Levis Chani** testified that the offence was committed on 7<sup>th</sup> September, 2007 and he arrested the accused on 9<sup>th</sup> September, 2007. That the post mortem was conducted on 8<sup>th</sup> September, 2007. He compiled and forwarded the police file to D.C.I.O Kirinyaga on 24<sup>th</sup> September, 2007 barely 12 days after the incident. That the file was returned to him on 30<sup>th</sup> October, 2007 for a statement to be taken from the Magistrate who took down the confession of the accused. This was done and the file re-submitted on the same day. Thereafter on 2<sup>nd</sup> November, 2007 he received greenlight to charge the accused. He immediately did so on the same day.

Upon cross-examination by counsel for the accused, the officer conceded that he was done with the

investigations within 12 days of the incident and submitted the file to his superior, the D.C.I.O. He exonerated himself from blame for the subsequent delay. Indeed he blamed the D.C.I.O for the delay.

*Section 72 (3) (b)* of the Constitution of Kenya provides interalia:-

**“A person who is arrested or detained**

**(a)** .....

**(b) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”**

Essentially what the section is saying is that for a capital offence such as the one the accused is faced with, he can only be detained in police custody for no more than fourteen days upon arrest before he is arraigned in court. In the event of any delay beyond the stipulated period aforesaid then a duty is cast upon the police who have been deemed to have breached that constitutional provision to convince the court that the accused was after all brought before court as soon as was reasonably practicable.

This court has, in several decisions, made it clear that where an appellant is held in custody for a period beyond the period provided by law which in this case is fourteen days from the date of his apprehension without acceptable explanation for such delay, the court would consider such extra period as being a period under which the person is held under unlawful custody and in such circumstances, his constitutional rights will be deemed to have been violated or breached, entitling him to an automatic acquittal much as the case against him may very well be overwhelming. In the now celebrated case of **Albanus Mwasia Mutua case (supra)**, the court of appeal reasserted this position as follows:-

**“At the end of the day it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under *section 72 (3) (b)* of the constitution also amounted to a violation of his rights under *section 77 (1)* of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”**

The above principles were adopted by the same court in the case of **Paul Mwangi VS Republic Criminal Appeal No.35 of 2006** where it proffered what explanations a court might consider in respect of a delay to avail an accused person to court within the period prescribed under *Section 72 (3) (b)* of the Constitution. Having done so, and considering the period of delay in that particular case, the court went on to state thus:-

**“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the court in Mutua’s case.”**

Thus, the law as to the treatment the courts should give to cases where the provisions of *Section 72 (3) (b)* of the Constitution is alleged to have been violated without acceptable and reasonable explanation is now well settled. As stated in the case of **Daniel Munyoki Nyanza & Anor Vs Republic, C.A. CR.APP. No.134 of 2005** (unreported)

**“The facts must exist to show that the police have detained a person in unlawful custody before courts can act on the allegation. Such facts would be readily available in the record before the court in case of first or second appeal or would be adduced in evidence in case of the trial court. Courts of law do not act in a vacuum nor would a court of law act on half-baked evidence. In the cases we have cited above, there was, in the record, clear undisputed evidence of such violation and the period of the delay to take the appellants to court was well established.”**

In this case the prosecution has conceded that there was a delay of about three months in charging the accused. They have offered no explanation whatsoever for the delay. Indeed the investigating officer was candid and laid the blame at the doorsteps of the D.C.I.O. As far as he was concerned there was no cause or reason to have had the accused rot in the police cells for all that time when the investigations were complete. It was not critical that the statement by the Magistrate who recorded the confession be taken before the accused could be arraigned in court. That statement could still have been taken even after the accused had been taken to court and charged.

The investigating officer did his best in the circumstances and has acquitted himself very well indeed. He had no role at all in the delay in charging the accused. The D.C.I.O who held over the file for close to two months has not offered any explanation as to what he was doing with the file all these time. I must say that this is one of those cases where the police did not move with diligence. This court cannot condone police lethargy. The trend where files are shuffled from office to office and left to gather dust at the expense of the accused’s constitutional rights must be frowned upon and discouraged.

No doubt the police by their lethargic actions have violated the constitutional rights of the accused by detaining her in their custody for a whole three or so months. On the authorities, the accused is entitled to an acquittal irrespective of the nature and strength of the evidence which may have been adduced in support of the charge against her. The police having violated the accused’s rights under *section 72 (3) (b)* of the constitution and having failed to persuade me that they brought the accused before court as soon as was reasonably practicable, I would uphold the preliminary objection raised by the accused. Accordingly I hold that any further proceedings against the accused is oppressive unconstitutional and a nullity. The consequence of my so holding is that the accused is entitled to an acquittal. She is so acquitted of the charge.

***Dated and delivered at Nyeri this 30<sup>th</sup> day of October, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**